

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: March 9, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

—
Trademark Trial and Appeal Board
—

In re Dolphin Instruments and Gauges, Inc.
—

Serial No. 88578059
—

Jay W. Livingston of Livingston & Sword, P.A.,
for Dolphin Instruments and Gauges, Inc.

Todd J. Lewellen, Trademark Examining Attorney, Law Office 110,
Chris A.F. Pederson, Managing Attorney.

—
Before Taylor, Wellington, and Coggins,
Administrative Trademark Judges.

Opinion by Coggins, Administrative Trademark Judge:

Dolphin Instruments and Gauges, Inc. (“Applicant”) seeks registration on the Principal Register of the mark DOLPHIN (in standard characters) for goods ultimately identified as:

Fuel gauges; Level gauges; Odometers; Pressure gauges;
Speedometers; Tachometers; Water Temperature gauges;
all of the above exclusively only for use with classic cars
and kit cars, in International Class 9.¹

—
¹ Application Serial No. 88578059 was filed on August 14, 2019, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based upon Applicant’s claim of first use anywhere and use in commerce since at least as early as 1998.

The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, as applied to the goods identified in the application, so resembles the mark POWERDOLPHIN for

Industrial robots; Aeroplane engines; Aeronautical engines; Engines, other than for land vehicles; Motors for boats; Motors other than for land vehicles; Exhausts for motors and engines; Mufflers for motors and engines; Freewheels, other than for land vehicles; Fans for motors and engines; Pneumatic controls for machines, motors and engines, in Class 7; and

Aeroplanes; Amphibious airplanes; Space vehicles; Military drones; Civilian drones; Remotely operated vehicles for underwater inspections; Boats; Ship hulls; Screw propellers for vehicles; Screw-propellers for boats; Remotely operated vehicles for underwater inspections; Aircraft; Direction signals for vehicles; Suspension shock absorbers for vehicles, in International Class 12;²

on the Principal Register as to be likely to cause confusion, to cause mistake, or to deceive.

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed. We affirm the refusal to register.

I. Evidentiary Issue

Before proceeding to the merits of the refusal, we address an evidentiary matter. Applicant attached to its brief 18 pages of webpage evidence it previously made of

² Registration No. 6098513, issued July 14, 2020. The registration identifies additional goods in International Classes 9 and 28 that were not cited by the Examining Attorney as a basis for the refusal involved in this appeal.

record during prosecution of the involved application.³ Attaching previously submitted evidence to an appeal brief is unnecessary and impedes efficient disposition of the appeal by the Board. *In re Info. Builders Inc.*, 2020 USPQ2d 10444, *1 n.4 (TTAB 2020); *LifeZone Inc. v. Middleman Grp., Inc.*, 87 USPQ2d 1953, 1955 n.4 (TTAB 2008). “Such evidence should not, as a matter of course, be resubmitted as exhibits to the brief.” TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE § 1203.02(e) (2022). Instead, “[c]itation to evidence in briefs should be to the documents in the electronic application record by date, the name of the paper under which the evidence was submitted, and the page number in the electronic record.” Trademark Rule 2.142(b)(3), 37 C.F.R. § 2.142(b)(3).

II. Likelihood of Confusion

Section 2(d) of the Trademark Act provides that a proposed mark, for which application has been made, may be refused registration if it “[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office . . . as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive” 15 U.S.C. § 1052(d).

Our determination under Section 2(d) involves an analysis of all probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973)

³ See Applicant’s Main Brief, 6 TTABVUE 23-40; September 29, 2021 Response to Office Action at 9-26. Citations to the briefs in the appeal record refer to the TTABVUE docket system, while citations to the prosecution record refer to the .pdf version of the TSDR system. See *In re Integra Biosciences Corp.*, 2022 USPQ2d 93, *7 (TTAB 2022).

(setting forth factors to be considered, referred to as “*DuPont* factors”) *cited in B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We consider each *DuPont* factor for which there is evidence and argument. *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

Varying weights may be assigned to the *DuPont* factors depending on the evidence presented. *See Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1260 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination.”). In any likelihood of confusion analysis, two key considerations are the similarities between the marks (the first *DuPont* factor) and the similarity of the goods (the second *DuPont* factor). *See In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017); *In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945 (Fed. Cir. 2004).

In applying the *DuPont* factors, we bear in mind the fundamental purposes underlying Trademark Act Section 2(d), which are to prevent consumer confusion as to source and to protect registrants from damage caused by registration of similar marks likely to cause such confusion. *Park ’N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 224 USPQ 327, 331 (1985); *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 34 USPQ2d 1161, 1163 (1995); *DuPont*, 177 USPQ at 566.

A. Similarity or Dissimilarity of the Marks

“Under the first *DuPont* factor, we consider ‘the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.’” *In re Embiid*, 2021 USPQ2d 577, at *11 (TTAB 2021) (quoting *Palm Bay Imps. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *Id.* (quoting *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) and *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)).

“The proper test regarding similarity ‘is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.’” *Id.* (quoting *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018)). Consumers may not necessarily encounter the marks in close proximity and must rely upon their recollections thereof over time. *In re Mucky Duck Mustard*, 6 USPQ2d 1467, 1468 (TTAB 1988). “The proper perspective on which the analysis must focus is on the recollection of the average customer, who retains a general rather than a specific impression of marks.” *Embiid*, 2021 USPQ2d 577, at *11 (quoting *In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1630 (TTAB 2018)).

The Examining Attorney argues that Applicant’s mark DOLPHIN and Registrant’s mark POWERDOLPHIN are similar in appearance, sound, connotation,

and commercial impression because each mark contains the term DOLPHIN, which is arbitrary when used with the goods, and the additional term POWER in Registrant's mark adds little to that mark's commercial impression because POWER is descriptive or highly suggestive of the goods, such that POWER is insufficiently distinctive to obviate a likelihood of confusion between the marks.⁴

Applicant argues that Registrant's mark is registered as "a single word" without separation between the constituent words POWER and DOLPHIN, and that when the "unified word POWERDOLPHIN" is considered without dissecting the mark into individual words, the mark creates a different commercial impression from Applicant's DOLPHIN mark.⁵ Applicant also argues that Registrant's mark is "descriptive of the goods, which may move through the water or air or parts thereof."⁶

Because the cited registration is "prima facie evidence of the validity of the registered mark," *see* Trademark Act Section 7(b), 15 U.S.C. § 1057(b), we must presume that the cited mark POWERDOLPHIN is inherently distinctive as evidenced by its registration on the Principal Register without a claim of acquired distinctiveness under Trademark Act Section 2(f), 15 U.S.C. § 1052(f). *See Tea Bd. Of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006); *see also New Era Cap Co., Inc. v. Pro Era, LLC*, 2020 USPQ2d 10596, at *10 (TTAB 2020).

⁴ Examining Attorney's Brief, 9 TTABVUE 3-4.

⁵ 6 TTABVUE 13, 14.

⁶ Reply Brief, 8 TTABVUE 6.

It is evident that Applicant's mark merely deletes the word POWER from the registered POWERDOLPHIN mark. This deletion is not sufficient to make the marks so dissimilar as to avoid a likelihood of confusion. While there is no rule that the marks are automatically similar, likelihood of confusion has often been found where, as here, the entirety of one mark is incorporated in another. *See In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010) (Mark comprising letters ML "is likely to be perceived as a shortened version of ML MARK LEES when used on the same or closely related skin care products"; confusion is likely); *Coca-Cola Bottling Co. v. Joseph E. Seagram and Sons, Inc.*, 526 F.2d 556, 188 USPQ 105, 106 (CCPA 1975) (BENGAL contained in BENGAL LANCER); *Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, *6-7 (TTAB 2019) (ROAD WARRIOR contains WARRIOR). Because the marks share the word DOLPHIN, they are visually and aurally similar. We also find that the identical shared word DOLPHIN would have the same connotation in each mark: an ocean mammal with teeth and a long snout.⁷

When comparing the marks, we do not predicate our analysis on a dissection of the cited mark; we consider the marks in their entireties. *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014). But one feature of a mark may be more significant than another, and it is not improper, for rational reasons, to give more weight to a dominant feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *Id.*

⁷ See definition of "dolphin" from MACMILLAN DICTIONARY (macmillandictionary.com), October 26, 2021 Office Action at 200.

at 1161; *In re Chatam Int'l*, 71 USPQ2d at 1946. “[D]ifferent features may be analyzed to determine whether the parties’ marks are confusingly similar.” *Double Coin Holdings*, 2019 USPQ2d 377409, *7 (citing *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1050 (Fed. Cir. 2018)).

We disagree with Applicant that the compound nature of Registrant’s mark carries any special significance. Despite the lack of a space between the words POWER and DOLPHIN, the cited mark POWERDOLPHIN readily will be perceived as the combination of the two common words POWER and DOLPHIN. *Cf. Seaguard Corp. v. Seaward Int’l, Inc.*, 223 USPQ 48, 51 (TTAB 1984) (SEA GUARD and SEAGUARD “are, in contemplation of law, identical” and otherwise “essentially identical”); *Stockpot, Inc. v. Stock Pot Rest., Inc.*, 220 USPQ 52, 54 (TTAB 1983), *aff’d*, 737 F.2d 1576, 222 USPQ 665 (Fed. Cir. 1984) (finding STOCKPOT and STOCK POT “visually almost identical”).

Notwithstanding Applicant’s arguments to the contrary, we find that the presence of POWER in Registrant’s mark does not significantly distinguish the marks. As the dictionary definitions of POWER indicate,⁸ POWER may be an adjective meaning “operated mechanically or electrically rather than manually // a car with *power* locks // *power* tools,” and therefore individually descriptive or highly suggestive of some of the cited goods. Applicant argues that there is no evidence that Registrant intended

⁸ The Examining Attorney attached to his brief various dictionary definitions of the word POWER from the online version of the MERRIAM-WEBSTER DICTIONARY (merriam-webster.com). ⁹ TTABVUE 9. We take judicial notice of these definitions which Respondent also addresses in its reply brief. *See* 8 TTABVUE 5. *In re Omniome, Inc.*, 2020 USPQ2d 3222, at *2 n.17 (TTAB 2019) (granting request to take judicial notice of dictionary definitions attached to the examining attorney’s brief).

to use the specific definition of POWER on which the Examining Attorney focuses, nor evidence that it intended POWER to be used in any adjectival form.⁹ However, because DOLPHIN is a noun, we find it likely that consumers would perceive the preceding word POWER as an adjective modifier. The dictionary definition set forth above shows that POWER is descriptive or at least highly suggestive of Registrant's goods and, therefore, is less significant in creating the commercial impression of Registrant's mark POWERDOLPHIN. *See, e.g., Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) ("Regarding descriptive terms, this court has noted that the 'descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.'"). The commercial impression of the cited mark is a dolphin, whether a mechanical, electric, or strong dolphin. This is highly similar to the commercial impression of Applicant's DOLPHIN mark – which, to state the obvious, is also a dolphin.

While Applicant argues that the marks create different commercial impressions, Applicant does not explain in its main brief what the impression of the cited mark might be, or how it differs from the impression of Applicant's mark. In its reply brief, Applicant argues that when considering the identified goods in the cited registration, the verb definition of POWER meaning "to supply with power and especially motive power" is critical to the commercial impression of Registrant's mark.¹⁰ Even if we accept this premise, it does not change our finding that the marks have overall highly

⁹ 8 TTABVUE 5.

¹⁰ 8 TTABVUE 6.

similar commercial impressions: a dolphin. The dominant word DOLPHIN in Registrant's mark is still likely to convey a similar commercial impression as that same word conveys in Applicant's mark; and, given the context of Applicant's automotive goods, some of which directly relate to measuring elements of automotive power (e.g., a tachometer measures a motor's rotation speed), the commercial impressions of the marks would remain aligned.

We find that the marks POWERDOLPHIN and DOLPHIN are similar in their entireties in terms of appearance, sound, connotation, and overall commercial impression. The first *DuPont* factor favors a finding of likelihood of confusion.

B. Similarity or Dissimilarity of the Goods and Trade Channels

The second *DuPont* factor considers the similarity or dissimilarity and nature of the goods as described in an application or registration, and the third *DuPont* factor considers the similarity or dissimilarity of established, likely-to-continue trade channels. *Sabhnani v. Mirage Brands, LLC*, 2021 USPQ2d 1241, at *19 (TTAB 2021) (quoting *Detroit Athletic Co.*, 128 USPQ2d at 1051-52 and *DuPont*, 177 USPQ at 567)).

The issue is not whether purchasers would confuse the goods, but whether there is a likelihood of confusion as to the source of the goods. *In re Ox Paperboard, LLC*, 2020 USPQ2d 10878, at *5 (TTAB 2020); *L'Oreal v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012). The goods need not be identical or even competitive to find a likelihood of confusion. *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894,

1898 (Fed. Cir. 2000). They need only be “related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); *see also In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785 (TTAB 1993).

In considering the similarity or dissimilarity of the goods, we look to the identifications in the application and cited registration. *See Detroit Athletic Co.*, 128 USPQ2d at 1052; *Stone Lion*, 110 USPQ2d at 1162; *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

Evidence of relatedness may include excerpts from computer databases showing that the goods are used together or used by the same purchasers; advertisements showing that the goods are advertised together or sold by the same manufacturer or dealer; and copies of prior use-based registrations of the same mark for both applicant’s goods and the goods listed in the cited registration. *In re Embiid*, 2021 USPQ2d 577, at *22-23 (citing *Ox Paperboard*, 2020 USPQ2d 10878, at *5; and *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (evidence that “a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis”)).

As noted above, the identification of goods in the application is:

Fuel gauges; Level gauges; Odometers; Pressure gauges; Speedometers; Tachometers; Water Temperature gauges; all of the above exclusively only for use with classic cars and kit cars, in International Class 9;

and the relevant identification of goods in the cited registration includes:

Exhausts for motors and engines; Mufflers for motors and engines; Freewheels, other than for land vehicles; Fans for motors and engines; Pneumatic controls for machines, motors and engines, in Class 7; and

Aeroplanes; Amphibious airplanes; Space vehicles; Military drones; Civilian drones; Remotely operated vehicles for underwater inspections; Boats; Ship hulls; Screw propellers for vehicles; Screw-propellers for boats; Remotely operated vehicles for underwater inspections; Aircraft; Direction signals for vehicles; Suspension shock absorbers for vehicles, in International Class 12.

The Examining Attorney argues that Applicant's goods are specifically related to Registrant's "exhausts for motors and engines" and "mufflers for motors and engines" in Class 7, as well as the "direction signals for vehicles" and "suspension shock absorbers for vehicles" in Class 12, because they are all "vehicle parts" and thus "similar in nature," they are frequently provided by the same entities under the same mark, and they are sold in the same channels of trade.¹¹

In support of these positions, the Examining Attorney cites to copies of third-party webpages made of record in the March 30 and October 26, 2021, Office Actions showing various third parties offering for purchase under the same mark one or more goods of the types identified in both Applicant's application and the cited registration. 9 TTABVUE 5-6. *See* March 30, 2021 Office Action at 8-22 (jeps.com: fuel gauges, pressure gauges, water temperature gauges, speedometers, tachometers, and direction signals for vehicles), 24-50 (streetrodhq.com: various instrument gauges for classic American cars, including fuel gauges, speedometers, tachometers, and

¹¹ 9 TTABVUE 5.

direction signals); October 26, 2021 Office Action at 8-17 (automann.com: vehicle gauges, exhausts, mufflers, direction signals, and shock absorbers), 18-25 (holley.com: fuel gauges, speedometers, tachometers, water temperature gauges, pressure gauges, and exhausts),¹² 44-52 (moroso.com: fuel gauges, pressure gauges, exhausts, mufflers), 53-91 (omix-ada.com: speedometers, tachometers, pressure gauges, temperature gauges, mufflers, shock absorbers, and direction signals for vehicles), 92-116 (speedwaymotors.com: speedometers, water temperature gauges, fuel gauges, other instrument gauges, mufflers, direction signals for vehicles, and shock absorbers), 117-133 (summitracing.com: fuel pressure gauges, tachometers, water temperature gauges, exhausts, mufflers, and direction signals for vehicles), and 134-143 (revel-usa.com: speedometers, water temperature gauges, oil pressure gauges, various other instrument gauges, exhausts, and mufflers).

Applicant does not address this website evidence except to argue that it does not demonstrate that Applicant's and Registrant's goods have the "essential relationship" of being key components and/or replacement parts of one another's goods.¹³ But, of course, that is not the test. All that is required is simply that the goods are related in some manner or the marketing therefor could give rise to the mistaken belief that they emanate from a common source. *See Coach Servs.*, 101 USPQ2d at 1722; *In re G.B.I. Tile and Stone, Inc.*, 92 USPQ2d 1366, 1371 (TTAB 2009) (holding the goods,

¹² The holley.com website also sells mufflers, shock absorbers, and turn signals under the Holley online retail store service mark, but these goods are themselves branded with separate marks. *See* October 26, 2021 Office Action at 36-39, 41 (Flowmaster mufflers, Rekundo shocks, and Scott Drake shocks and turn signal levers).

¹³ 6 TTABVUE 18-19.

while different and not interchangeable, are related because the evidence, including Internet excerpts showing third parties using the same marks for both sets of products, clearly demonstrates that there are entities that are the source of both sets of products); *Seaguard*, 223 USPQ at 51.

We find that the third-party webpage evidence showing the same mark used for some of both Applicant's goods and Registrant's goods is probative to demonstrate that the goods are related for likelihood of confusion purposes. *See, e.g., Detroit Athletic Co.*, 128 USPQ2d at 1051 (relatedness supported by evidence that third parties sell both types of goods under same mark, showing that "consumers are accustomed to seeing a single mark associated with a source that sells both."); *In re Anderson*, 101 USPQ2d 1912, 1920 (TTAB 2012) (Internet excerpts from "several third-party car dealerships offering 'tires' for sale on their websites" was "evidence that consumers expect to find both 'tires,' . . . "and 'automobiles' . . . emanating from a common source.").

In further support of the relationship between the goods, the Examining Attorney submitted fifteen third-party registrations for marks identifying goods in both the application and cited registration. The following eight registrations and relevant portions of their identifications are representative of the fifteen third-party registrations made of record:¹⁴

Mark	Reg. No.	Relevant Goods
BLITZ	2162356	Mufflers, speedometers, shock absorbers

¹⁴ October 26, 2021 Office Action at 144-199.

Mark	Reg. No.	Relevant Goods
BRABUS	2628813	Shock absorbers, exhaust systems, speedometers, tachometers
OPGI	3187982	Various gauges for land vehicles, exhaust manifolds, mufflers
	5039243	Engine exhaust systems, mufflers, vehicle turn-signal light bulbs, automotive measuring instruments including water temperature gauges, fuel gauges, level gauges, pressure gauges
RESTOPARTS	5161943	Vehicle engine exhaust manifold and mufflers, gauges for land vehicles including fuel gages, water temperature gauges, tachometers
	5351560	Exhausts for motors and engines, exhaust mufflers for motors, vehicle turn-signal light bulbs, automotive water temperature gauges, fuel gauges, pressure gauges, speedometers
ARLEN NESS	5353557	Exhausts for motors and engines, exhaust mufflers for motors, turn signals for vehicles, speedometers, tachometers
	5612138	Automotive engine exhaust systems, exhaust mufflers, automotive gauges including temperature gauges, speedometers, tachometers

These third-party registrations based on use in commerce that individually cover a number of different goods serve to suggest that the listed goods are of a type that may emanate from the same source. *In re Country Oven, Inc.*, 2019 USPQ2d 443903, at *8 (TTAB 2019); *In re I-Coat Co.*, 126 USPQ2d 1730, 1737 (TTAB 2018); *Joel Gott Wines LLC v. Rehoboth Von Gott Inc.*, 107 USPQ2d 1424, 1432 (TTAB 2013).

Applicant posits that the exclusionary language “other than for land vehicles” in Registrant’s Class 7 identification of engines (generally), motors (generally), and freewheels (generally) suggests that all of the other individual goods identified in that class – even those not specifically excluded from association with land vehicles – are sufficiently different and distinguishable that there is no likelihood of confusion.¹⁵ However, while three of Registrant’s goods exclude use with land vehicles, the rest of the identified goods do not. The other goods in Class 7, separated by semicolons, are not subject to that limiting language, *see Monster Energy v. Lo*, 2023 USPQ2d 87, at *15 n.35 (TTAB 2023) (citing TMEP § 1402.01(a): semicolons separate distinct categories of goods and services), and we are required to “give full sweep” to Registrant’s other identified goods. *See Paula Payne Prods. Co. v. Johnson Publ’g Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) (Board must “give full sweep” to an identification of goods regardless of the registrant’s actual business).

In another effort to limit the scope of the cited goods, Applicant suggests that we should look to “the goods the Registrant is actively marketing” to aid in our analysis

¹⁵ 8 TTABVUE 10.

of the comparison of the goods.¹⁶ However, Applicant cannot restrict the broad identification of goods in the cited registration at issue on this appeal by extrinsic evidence of the actual use of the mark. *See, e.g., Embiid*, 2021 USPQ2d 577, at *28 & n.38. *See also Octocom Sys. Inc. v. Hous. Comput. Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (“The authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s goods . . .”).¹⁷

The above-noted third-party webpage and third-party registration evidence demonstrates that Registrant’s “exhausts for motors and engines,” “mufflers for motors and engines,” “direction signals for vehicles,” and “suspension shock absorbers for vehicles” are related to Applicant’s various gauges, speedometers, and tachometers. Nonetheless, Applicant argues that the goods are not even “remotely related,”¹⁸ and emphasizes this point by focusing on other goods in the cited registration (e.g., “space vehicles”) instead of those four on which the Examining Attorney focuses. Under the second *DuPont* factor, we need not find similarity as to

¹⁶ 8 TTABVUE 10.

¹⁷ Given Applicant’s arguments about alleged real world differences between the goods at issue that are not reflected in the identification of goods of the cited registration, we emphasize that we must “decide this ex parte appeal based on the information on the face of the cited registration; we do not read in limitations.” *In re Cook Med. Techs. LLC*, 105 USPQ2d 1377, 1384 (TTAB 2012). The proper remedy for an applicant to limit the scope of a registrant’s identified goods is via an inter partes proceeding seeking partial cancellation or restriction pursuant to Section 18 of the Trademark Act, 15 U.S.C. § 1068. *See e.g., id.* at 1384-85.

¹⁸ 6 TTABVUE 16.

each product listed in the descriptions of goods. It is sufficient that we focus on the relatedness of those goods that the Examining Attorney highlights.¹⁹ *See Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 938-39 (Fed. Cir. 1983) (holding that a single good from among several may sustain a finding of likelihood of confusion); *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015); *In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1409 (TTAB 2015), *aff'd* 866 F.3d 1315, 123 USPQ2d 1744 (Fed. Cir. 2017).

The same third-party webpages referenced above demonstrate that some of the goods offered under Applicant's and Registrant's marks are offered on the same automotive supply company websites. This evidence supports a finding, in line with the Examining Attorney's argument, that these goods are offered in at least one common channel of trade, that is, the websites operated by the third-party automotive products companies.

In addition, the cited registration does not contain any restrictions on the channels of trade or classes of purchasers for the broadly-identified "exhausts for motors and engines," "mufflers for motors and engines," "direction signals for vehicles," and "suspension shock absorbers for vehicles." Where the goods in a cited registration are

¹⁹ In its reply brief Applicant appears to dispute the principle that it is sufficient for a finding of likelihood of confusion if relatedness is established for any item encompassed in the identification of goods in a particular class in the application and registration. 8 TTABVue 8. This is a long-standing, well-established principle, and we need not give Applicant's implied argument further consideration. *See, e.g., Double Coin Holdings v. Tru Dev.*, 2019 USPQ2d 377409, at *6 ("We need not consider, however, whether each of Double Coin's recited goods is related to Tru's goods for purposes of a *DuPont* analysis, as it is sufficient if likelihood of confusion is found with respect to any product recited in Double Coin's registration."); *In re La Peregrina Ltd.*, 86 USPQ2d 1645, 1646 (TTAB 2008) (citing *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981)).

broadly described and there are no limitations in the identification of goods as to their channels of trade or classes of purchasers, it is presumed that the scope of the registration encompasses all goods of the nature and type described, that the identified goods move in all channels of trade that would be normal for such goods, and that the goods would be purchased by all potential customers. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). Here, we must presume that Registrant's goods are available for use with classic cars and kit cars – and indeed, the evidence demonstrates that some of these websites market goods listed in the registration specifically for use with classic cars.²⁰

In view of the evidence adduced by the Examining Attorney, the second and third *DuPont* factors regarding the similarity of the goods and channels of trade favor a finding of a likelihood of confusion.

C. Other Factors

Applicant argues that “[i]n focusing on the two ‘key’ *DuPont* factors [the similarity or dissimilarity between the marks and the goods], the Examining Attorney forgot about the other important factors: (1) the variety of goods on which a mark is or is not used[, the ninth *DuPont* factor]; (2) the extent of potential confusion, i.e., whether

²⁰ See March 30, 2021 Office Action at 29 (streetrodhq.com, selling turn signal assemblies for 1939-1952 Chevrolet cars, and any street rod application); October 26, 2021 Office Action at 42 (holley.com, selling Scott Drake-branded goods from “the world’s largest manufacturer and supplier or reproduction parts for classic Mustangs.”), 56, 60 (omix-ada.com, selling replacement parts for Willys and Jeeps as far back as the 1948 model year), 100 (speedwaymotors.com, listing parts for various types of vehicles including Classic Truck, Hot Rod, and Muscle Car), 131 (summitracing.com, advertising “replacement turn signal switches are designed to be exact replacements If you’re restoring your ride and need exact specification turn signal switches, Summit Racing® has you covered.”).

de minimis or substantial[, the twelfth *DuPont* factor;] and (3) any other established fact probative of the effect of use[, the thirteenth *DuPont* factor].”²¹ However, Applicant does not point to any evidence or make specific arguments as to these individual factors.²² “Because there is no argument or record evidence directed to these factors, we have not considered them in our analysis of the likelihood of confusion.” *Embiid*, 2021 USPQ2d 577, at *10 n.26.

D. Conclusion on Likelihood of Confusion

We have found that the marks POWERDOLPHIN and DOLPHIN are similar in their entireties in terms of appearance, sound, connotation, and overall commercial impression, and that the goods are similar and travel through at least some of the same channels of trade. In view thereof, we find confusion is likely between Applicant’s mark DOLPHIN and the cited mark POWERDOLPHIN.

III. Decision

The refusal to register Applicant’s mark DOLPHIN is affirmed.

²¹ 6 TTABVUE 21.

²² To the extent Applicant used language from the ninth, twelfth, and thirteenth *DuPont* factors in reference to its argument that the second factor (i.e., the similarity or dissimilarity of the goods) should be considered in light of Registrant’s identification specifically listing other goods such as aeroplane engines, aeronautical engines, and motors for boats, *see* 6 TTABVUE 19-20, or excluding use with land vehicles for certain other goods, *see* 8 TTABVUE 10, we have considered and dispatched the argument appropriately under the second *DuPont* factor.